

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA,)
et al.,)
Plaintiffs,)
v.) No. 6:15-cv-01517-AA
THE UNITED STATES OF AMERICA,)
et al.,)
Defendants.)

ORAL ARGUMENT
BEFORE THE HONORABLE ANN AIKEN

Friday
June 25, 2021
10:00 A.M.

APPEARANCES:

For Plaintiffs: Ms. Julia Olson
Mr. Philip Gregory
Ms. Andrea Rodgers
For Defendants: Mr. Sean Duffy
Mr. Frank Singer

REPORTED BY: Ms. Eleanor G. Knapp, RPR-CSR

JUNE 25, 2021

Friday

10:00 A.M.

THE CLERK: Now is the time set for Civil Case Number 15-1517, Juliana, et al., v. United States of America, et al., for oral argument. If you could please introduce yourselves for the record, beginning with Plaintiffs.

MS. OLSON: Good morning, Your Honor. This is Julia Olson on behalf of the plaintiffs.

MR. GREGORY: Good morning, Your Honor. This is Philip Gregory on behalf of the plaintiffs.

MS. RODGERS: And good morning, Your Honor. This is Andrea Rodgers on behalf of the plaintiffs.

MR. DUFFY: Good morning, Your Honor. This is Sean Duffy on behalf of the defendants.

MR. SINGER: Good morning, Your Honor. This is Frank Singer on behalf of the United States.

THE COURT: Thank you all. I believe that's all that I expect on this call. Is that correct, Cathy?

THE CLERK: Yes, that is everyone, Judge. Thank you.

1 THE COURT: Thank you. I have
2 reviewed all the materials that have been submitted.

3 Ms. Olson, this is your motion to
4 amend, so I'm happy to hear any additional argument
5 you wish to make. Go ahead.

6 MS. OLSON: Thank you, Your Honor.
7 Good morning. May it please the Court, this is
8 Julia Olson on behalf of the plaintiffs, many of
9 whom are on the public call-in line today. We want
10 to thank Your Honor and the court staff for
11 providing the plaintiffs and the public the ability
12 to listen at a time when we cannot all gather at
13 person at the courthouse.

14 I would like to reserve five to ten
15 minutes for rebuttal with this Court's permission.

16 THE COURT: We don't stand on those
17 kind of technical time limits. So if you want to
18 respond, you'll be able to do that. Don't think
19 it's confined to that period of time. All right?

20 MS. OLSON: Thank you, Your Honor.

21 Your Honor, how our nation's children
22 and adults speak, move, love, vote, worship,
23 assemble, learn, and behave in our world is a
24 function of the rights we hold and those we are
25 denied. For our rights to endure in the face of

1 government policy threats, they need to be declared.

2 Do children have a right to free
3 speech on Snapchat when they aren't in school even
4 if that speech is profane? On Wednesday, eight
5 Supreme Court justices said yes, they do. The
6 Supreme Court issued a declaration of constitutional
7 law in Mahoney Area School District v. B.L.

8 THE COURT: May I interrupt for a
9 second? I apologize. But if you're not speaking,
10 would everyone else put their phone on mute. I
11 started to hear people talking, and it's difficult
12 enough to hear on these phone conference calls
13 generally. For the court reporter, it's even more
14 difficult. So again, please, everybody mute your
15 phone if you're not speaking.

16 And I apologize, Ms. Olson, for
17 interrupting. Please go ahead.

18 MS. OLSON: Thank you. That
19 declaration in Mahoney of a student's constitutional
20 rights isn't just about one 14-year-old cheerleader,
21 who is now in college. It's about the First
22 Amendment rights of children across the country.
23 It's also about the line where government interests
24 -- in that case, the public schools -- unjustly
25 invade those constitutionally protected rights.

1 Only our courts can declare those constitutional
2 rights and define those constitutional lines in a
3 final judgment for all.

4 Nearly 80 years ago in West Virginia
5 State Board of Education v. Barnette, the Supreme
6 Court also protected children who were in school
7 exercising their free speech and freedom of
8 religious expression, and the Court declared their
9 rights.

10 In 2005 in Roper v. Simmons, the
11 Supreme Court invoked the Eighth Amendment rights of
12 young people convicted of crimes and finally
13 declared that children cannot be sentenced to death.

14 In 2012 in Miller v. Alabama, the
15 Court said rarely should children be sentenced to
16 life without the possibility of parole. Since that
17 declaration of constitutional law in Miller, 31
18 states and the District of Columbia either banned
19 life without parole for children or have no children
20 serving that sentence. That declaration of rights
21 had real life consequences, not just for Evan
22 Miller, but many other children.

23 This term the Supreme Court clarified
24 when life without parole for Evan Miller and other
25 children may be permitted and when it deprives them

1 of fundamental rights under the Eighth Amendment.
2 And that new constitutional declaration and
3 clarification will also have profound consequences
4 for convicted children around the country, affecting
5 their entire life trajectory.

6 Only our courts can judge and declare
7 those constitutional rights and define those
8 constitutional lines. And those declaratory
9 judgments of our courts matter immensely.

10 21 children and young people are here
11 today to argue over whether they are entitled to
12 file an amended complaint that seeks primarily an
13 adjudication of whether they too have
14 constitutionally protected rights that have been
15 invaded by their government and where the line is of
16 that invasion or deprivation.

17 While this Second Amended Complaint is
18 not about First Amendment speech or Eighth Amendment
19 cruel and unusual punishment, the rights of Kelsey,
20 the eldest, and Levi, the youngest, and the 19 youth
21 in between are located in and protected by the Fifth
22 Amendment. And they are no less vital to their
23 freedom and their pursuit of happiness, the rights
24 to life and to personal security and to be free of
25 government-imposed danger, the right to family

1 autonomy, the right to a climate system that
2 sustains human life, the right to equal protection
3 of the law, and the right to public trust resources
4 are all at least as deeply rooted in the history of
5 our nation, as fundamental to our liberty as the
6 rights some people seek to own an AR-15 assault
7 weapon.

8 But just this month in Miller v.
9 Bonta, a federal judge in the Southern District of
10 California declared unconstitutional policies
11 banning children and adults from owning assault
12 weapons.

13 Our federal courts allow people
14 standing to assert their alleged fundamental rights
15 when they have real injuries in order to challenge
16 government policies that cause those injuries and
17 then have those rights adjudicated.

18 A declaration of rights and
19 constitutional limits on government policies very
20 often have significant ramifications because it
21 changes the legal relationship between all of us and
22 our government. It affects how we live our lives,
23 our dignity, and our physical security. Some
24 people, Your Honor, want to protect the right of
25 self-defense via alleged constitutional rights to

1 assault weapons, and they have standing to walk
2 through the courthouse doors and receive a
3 declaration on that issue.

4 These young people before you today
5 want to protect their lives and personal security
6 too. And they also have standing to receive a
7 declaration of their rights and the constitutional
8 limits on government policies when their government
9 is actively threatening their self-preservation.

10 So while we are here on a routine
11 motion to amend a prior complaint to correct a
12 perceived defect that was found by the Ninth
13 Circuit, the outcome of this routine motion has
14 monumental implications for whether justice is
15 served.

16 Here, where the law of the case is
17 that the subject matter of Plaintiffs' complaint --
18 the nation's energy system policies and practices
19 and the plaintiffs' Fifth Amendment claims against
20 that system -- are not barred by the political
21 question doctrine, it would be manifestly unjust and
22 contrary to Article III and the nearly century-old
23 act of Congress not to allow these children and
24 youth to access our judiciary to seek a declaration
25 of their constitutional rights and the line at which

1 those rights are infringed by their government.

2 That declaration alone, even if no
3 further relief is available, will change the current
4 legal status of these youth. And the plain text of
5 the declaratory judgment allows for just that.

6 Even where no further relief may be
7 available, this Court may issue declaratory judgment
8 for or against the plaintiffs where they have
9 demonstrated injury, causation, and a live case or
10 controversy with their government. And nothing the
11 Ninth Circuit said on interlocutory appeal changes
12 this Court's obligation to say what the law is.

13 I want to turn now to the Rule 15(a)
14 analysis. Your Honor, based on the briefing of the
15 parties there are two primary issues for this Court
16 to resolve in order to grant Plaintiffs' motion to
17 amend.

18 First, this Court should find the
19 Ninth Circuit dismissed the First Amended Complaint
20 without prejudice.

21 Second, this Court should hold that
22 the proposed Second Amended Complaint would not be
23 futile in light of the Ninth Circuit interlocutory
24 opinion and the law governing amendments because
25 there has been no delay, no bad faith, and there

1 will be no prejudice to defendants. Plaintiffs'
2 amendment should be granted in order to comply with
3 the spirit of Federal Rule of Civil Procedure 15(a)
4 to freely and liberally move meritorious cases to
5 trial and a merits judgment.

6 There is a presumption in favor of
7 amendment here that the Government has not rebutted.
8 And Eminence Capital, the Ninth Circuit case at
9 1052, stands for that.

10 So turning to the issue of prejudice,
11 the Ninth Circuit dismissal could only have been of
12 one type, and that's without prejudice. When a
13 court intends to dismiss a case with prejudice, it
14 says so. The Ninth Circuit did not do that here.
15 And most importantly, legally it could not have
16 dismissed the First Amended Complaint with prejudice
17 because it did not render a merits judgment. It did
18 not award summary judgment to Defendants, and it did
19 not find that no amendment could cure the purported
20 standing deficiency. Instead, what the Ninth
21 Circuit did on its face was dismiss the First
22 Amended Complaint for lack of subject matter
23 jurisdiction based on its view that Plaintiffs
24 lacked standing.

25 Courts are not permitted to get to the

1 merits resolution of a case when they lack
2 jurisdiction. The Government does not disagree that
3 there was no merits resolution, and they agree that
4 summary judgment was not awarded in their favor.

5 The circuit courts are unanimously in
6 agreement on this. And the courts say consistently
7 that it would actually be inappropriate for an
8 appellate court to dismiss with prejudice for lack
9 of standing. The Ninth Circuit case Fleck &
10 Associates at 471 F.3d 1106 supports that.

11 Thus, in the mandate issued to this
12 Court, the directions had to be to dismiss
13 Plaintiffs' First Amended Complaint without
14 prejudice.

15 That then brings us to the futility
16 analysis. Before I address that question of
17 futility and walk through the Ninth Circuit opinion,
18 I think it's really important to talk about the
19 procedural posture of the First Amended Complaint on
20 interlocutory appeal. That procedural posture set
21 the stage for the Ninth Circuit's opinion and what
22 it did and did not do in that opinion.

23 Unlike most of the cases the
24 Government relies upon for its futility analysis
25 where Plaintiffs' complaints were dismissed by the

1 district court, in this case, as Your Honor well
2 knows, Plaintiffs won Defendants' motion to dismiss
3 and prevailed on every motion the Government made to
4 dismiss the case. So at the time of the
5 interlocutory appeal, there was no final judgment in
6 this Court as to standing. There were no findings
7 of fact. And the reason was, of course, that there
8 were disputed issues of material fact that this
9 Court needed a trial and finding of fact to resolve
10 as is the ordinary course of litigation.

11 But the Government wanted premature
12 review of those pretrial decisions. All they could
13 take up to the Ninth Circuit were this Court's
14 denials of their pretrial motions. And the Ninth
15 Circuit was only in a position to resolve the
16 arguments the Government put before them as to why
17 the case should be prematurely dismissed.

18 And this is key. The Ninth Circuit
19 focused its redressability analysis right where
20 Defendants asked it to. They asked the Ninth
21 Circuit to say that Plaintiffs' specific request for
22 a court-ordered remedial plan was outside the
23 jurisdiction of the courts and, for that reason,
24 Plaintiffs could not seek their central relief which
25 was injunctive. And therefore, the Ninth Circuit

1 said Plaintiffs had no standing.

2 The Government's opening brief on
3 interlocutory appeal never once argued that
4 Plaintiffs could not obtain declaratory relief nor
5 that declaratory relief would not provide at least
6 partial redress. They never made that argument in
7 their opening or reply brief. Thus, it's not
8 surprising that the Ninth Circuit did not analyze
9 and conclusively address whether declaratory
10 judgment sufficed for the redressability prong of
11 Plaintiffs' Article III standing.

12 And that important back story of how
13 we arrived at this moment dictates how this Court
14 should also interpret the Ninth Circuit's ruling on
15 the First Amended Complaint.

16 So going into futility, the law of the
17 case right now on standing is crucial to look at at
18 this juncture. And Plaintiffs believe the Court
19 should take the Ninth Circuit at its word as to its
20 three specific holdings. And these are quotes from
21 the Ninth Circuit opinion.

22 First, quote, The district court
23 correctly found the injury requirement met, at 1168.

24 Second, The district court correctly
25 found the Article III causation requirement

1 satisfied for purposes of summary judgment, at 1169.

2 And third, quote, It is beyond the
3 power of an Article III court to order, design,
4 supervise, or implement the plaintiffs' requested
5 remedial plan, at 1171.

6 That is the explicit law of the case
7 that was fully analyzed and briefed on standing and
8 resulted in the dismissal of the First Amended
9 Complaint.

10 With respect to the issue of whether
11 Plaintiffs could cure that deficiency, the Ninth
12 Circuit was silent. It's interlocutory opinion did
13 not address whether amendment would be futile, and
14 that remains an open question for the discretion of
15 this Court.

16 And importantly, Defendants suggest
17 that the Ninth Circuit opinion should just be pasted
18 on the Court's decision here. But that opinion was
19 only with respect to the First Amended Complaint.
20 That Court did not have Plaintiffs' proposed Second
21 Amended Complaint before it which has new requests
22 for relief and new factual allegations that must be
23 taken as true.

24 And what those allegations taken as
25 true --

1 THE COURT: I'm sorry. Ms. Olson,
2 will you step back at the beginning again of that
3 argument? I got -- you kind of cut in and out a
4 little bit. Would you go back to that, right after
5 you finished the three issues that were the holding
6 and the law of the case. So just right at the end
7 of that, would you start into that next argument? I
8 apologize. I thought I caught it all, but I really
9 want you to redo it for me.

10 MS. OLSON: Yes. Of course, Your
11 Honor. No problem.

12 So with respect to amending the
13 complaint and whether that would be futile or not,
14 the Ninth Circuit was silent. Its interlocutory
15 opinion did not address futility of amendment, and
16 that remains an open question for this Court to
17 decide and it's fully within this Court's
18 discretion.

19 The Ninth Circuit's dismissal order
20 also only applied to Plaintiffs' First Amended
21 Complaint. And now that the Second Amended
22 Complaint has a new request for relief and new
23 factual allegations that must be taken as true, the
24 order of the Court requiring dismissal of the First
25 Amended Complaint does not automatically apply to

1 the Second Amended Complaint.

2 Specifically, Plaintiffs now allege
3 for the first time in the Second Amended Complaint
4 that if this Court declares the nation's energy
5 system policies and practices unconstitutional, the
6 Government will change those policies and practices
7 to stop the constitutional violation. The
8 constitutional controversy would then be resolved,
9 and the legal status of the plaintiffs would be
10 forever altered vis-a-vis their relationship with
11 their government just as the legal status of
12 children was altered in Brown v. Board of Education
13 or in the Mahoney School District case with respect
14 to the rights -- the free speech rights of children.

15 Some of the important paragraphs in
16 the Second Amended Complaint are 95-A, 95-B,
17 paragraph 12, 276-A, and paragraph 212. And these
18 paragraphs tell the factual story that in addition
19 to the plaintiffs being injured in all of the ways
20 that have already been accepted as law of the case,
21 the plaintiffs are being injured because their
22 federal government continues to put them at greater
23 risk of even more physical and mental health harm
24 than they already experience. And that's caused by
25 the policies and practices of the national energy

1 system that are continuing and ongoing.

2 And Plaintiffs allege that if that
3 system is declared unconstitutional, Defendants
4 thereafter will abide by this Court's declaratory
5 judgment and reduce, to a meaningful extent, the
6 cause of the harm. Plaintiffs allege that
7 Defendants would abide by the decree of the Court
8 and bring the energy system into constitutional
9 compliance, redressing the substantial cause of
10 these Plaintiffs' constitutional injuries.

11 The defendants want this Court to read
12 into the interlocutory opinion an implied ruling
13 that the Ninth Circuit has barred this Court from
14 allowing the amended complaint or that the Ninth
15 Circuit is barring this Court from issuing
16 declaratory judgment. But that reading of the Ninth
17 Circuit opinion, Your Honor, asks you to ignore what
18 the Court explicitly said was the central issue
19 before it. And that's a quote at page 1164 and -65
20 of the interlocutory opinion.

21 The central issue before the Court was
22 whether an Article III court can provide the
23 plaintiffs the redress they seek, an order requiring
24 the Government to develop a plan to phase out fossil
25 fuel emissions. So that central issue was

1 injunctive relief, and that is what the Court
2 addressed. Declaratory judgment was not the issue
3 that the defendants put before the Ninth Circuit,
4 and it wasn't the issue the Ninth Circuit was
5 focused on addressing.

6 This Court in Hampton v Steen
7 explained that leave to amend should be denied only
8 when it is clear that the complaint cannot be saved
9 by any amendment and that a district court should
10 not read into an appellate mandate language that is
11 not there, particularly when doing so would result
12 in a manifest injustice. This Court specifically
13 wrote at page 2 of your opinion in Hampton, "When a
14 court is presented with new law, new facts, or
15 otherwise changed circumstances, it has discretion
16 to rule afresh."

17 Here there is new law, there are new
18 facts, and changed circumstances all present. And
19 the combination of these factors justify allowing
20 the Second Amended Complaint to proceed.

21 And importantly in this Rule 15(a)
22 analysis, it's Defendants' burden to prove
23 otherwise. So going to Defendants' burden on the
24 law of the declaratory judgment, first Defendants
25 must squarely address the law on whether declaratory

1 judgment as set forth in Plaintiffs' Second Amended
2 Complaint is sufficient for Article III standing.

3 The burden to prove that declaratory
4 judgment could not be awarded is theirs at this
5 stage. Yet they do not grapple with the most
6 pertinent case law in their brief. Defendants
7 ignore the MedImmune case of the Supreme Court,
8 which sets the case or controversy standard for
9 obtaining a declaratory judgment. They never once
10 argued that declaratory -- sorry, Your Honor.

11 THE COURT: You cut out. So again,
12 can you start back in your argument? You just cut
13 out.

14 MS. OLSON: Yes. I apologize, Your
15 Honor.

16 THE COURT: No. That's the nature of
17 doing these hearings remotely.

18 MS. OLSON: Yes. So on the point of
19 whether declaratory judgment can be awarded in this
20 constitutional rights case, it's Defendants' burden
21 to show that declaratory judgment could never be
22 awarded. And they don't grapple with the most
23 pertinent case law on that issue.

24 For example, they ignore entirely the
25 MedImmune case of the Supreme Court which sets the

1 case or controversy standard for obtaining a
2 declaratory judgment under the Declaratory Judgment
3 Act. Defendants never argue that declaratory
4 judgment cannot suffice for standing. And they
5 don't explain how the plain language of the
6 Declaratory Judgment Act doesn't mean that even when
7 no other relief is available, Plaintiffs can get a
8 declaration of their rights and the wrongdoing of
9 the Government as long as there is a live
10 controversy between the parties and there is injury
11 and causation.

12 The defendants also don't fully
13 grapple with the analysis in the *Uzuegbunam v.*
14 *Preczewski* case that was recently decided. That
15 case clearly says that where there is an injury and
16 where there is causation in a constitutional case,
17 that even where the injury and causation no longer
18 exist, that a nominal damage of one dollar is enough
19 for the redressability prong of Article III standing
20 because that one dollar acts as a form of
21 declaratory relief.

22 They don't respond to the Supreme
23 Court's clear ruling that at common law nominal
24 damages acted as the equivalent of declaratory
25 judgment before declaratory judgment acts existed.

1 THE COURT: May I interrupt? My
2 understanding of your amendment is that you are
3 asking for the declaratory relief along with the
4 nominal damages. Am I correct about that?

5 MS. OLSON: Your Honor, we have not
6 asked for nominal damages. We could amend the
7 complaint to do that, but we think that in this
8 case, because we have an ongoing and live
9 controversy with the Government, that declaratory
10 judgment is the appropriate remedy. A nominal
11 damage remedy would only be appropriate here if the
12 Government rescinded and corrected the energy
13 policies that are causing the constitutional
14 violation as the Government had done so in
15 Uzuegbunam.

16 THE COURT: Because that intervening
17 Supreme Court case changes somewhat the complexion
18 of everything, I'm just suggesting that out of an
19 abundance of analysis and saving, perhaps, future
20 sets of motions, that you might want to have that in
21 your complaint in the alternative -- and/or. You
22 know, I'm just thinking of that Supreme Court case
23 and wanting to make sure that we don't ignore sort
24 of the direction the Supreme Court gave in that
25 case. Just -- that's why I asked. I didn't see

1 that that was in your amended complaint.

2 Anyway, go ahead and with your
3 argument.

4 MS. OLSON: Thank you, Your Honor. We
5 think that paragraph 4 of the prayer for relief
6 includes the ability of the Court to award nominal
7 damages, but we can also amend that into the
8 complaint expressly.

9 So in addition to not grappling with
10 the clear law under the Declaratory Judgment Act and
11 under Article III standing where there are abundant
12 new cases from the Supreme Court this term, the
13 defendants also don't address or meet their burden
14 to prove futility with respect to the new factual
15 allegations that are in the Second Amended
16 Complaint.

17 They must argue that it is clear
18 beyond doubt that declaratory judgment would not
19 provide any redress of Plaintiffs' injuries, and the
20 Ninth Circuit has held that in the Center for
21 Biological Diversity v. Veneman case at page 1114.

22 The Government here does not contend
23 that it will not change its energy policy and
24 practices if the Court awards this (unintelligible)
25 here, a declaration of their rights and a

1 declaration of the Government's constitutional
2 violation in carrying out that system.

3 They also don't contest the new
4 factual allegations that when the Government
5 corrects its constitutional violations that
6 significant risks of ongoing and worsening harm to
7 Plaintiffs will abate. Their silence on these
8 points does not meet their burden to prove up
9 futility. And in fact, Defendants, throughout the
10 course of these six years of litigation, have
11 consistently sought to ignore the important redress
12 of declaratory judgment in the constitutional
13 controversy and in this case. They ignored it on
14 interlocutory appeal, and they are trying to
15 sidestep it here as well.

16 But Brown v. Board of Education is
17 still good law. And in 1954 the Supreme Court said
18 that the first and most important question was
19 declaring the rights of the children to equal
20 integrated education.

21 So the proper interpretation of any
22 ambiguity in the Ninth Circuit interlocutory opinion
23 must be one that is consistent with Article III, the
24 Declaratory Judgment Act, and Supreme Court
25 precedent interpreting and setting the law for how

1 the lower courts should view their obligations to
2 hear cases.

3 The amended factual allegations. We
4 allege that the Government will comply with the
5 Court's order. And that's also backed up not just
6 by the factual allegations but by the law of the
7 Ninth Circuit and the Supreme Court in the Evans and
8 Eu cases cited in our brief.

9 So just to be really clear, because I
10 think the Ninth Circuit opinion and how it treats
11 declaratory relief and, of course, predominantly
12 injunctive relief is something that Your Honor has
13 to wrestle with, and what the rule of mandate case
14 has made clear is that this Court can decide any
15 issue that the Ninth Circuit is silent on or did not
16 lay to rest.

17 The dismissal by the Ninth Circuit was
18 not a blanket dismissal. It did not -- that Court
19 did not address every aspect of this Court's prior
20 order. It was limited to the reasons it stated.
21 And on this motion to amend, we don't need to argue
22 whether the Ninth Circuit got it right or got it
23 wrong. We need to look at what they didn't consider
24 and did not rule on.

25 So I want to walk through this list of

1 what the Ninth Circuit is silent on.

2 The Ninth Circuit was silent on
3 whether amendment would be futile.

4 They were silent on the Declaratory
5 Judgment Act and never cited 28 USC 2201.

6 They were silent on the Supreme Court
7 precedent of MedImmune which sets the case or
8 controversy standard for declaratory judgment.

9 They were silent on the second prong
10 of the redressability analysis with respect to
11 whether the Court has the authority to award
12 declaratory judgment.

13 They were silent on the likelihood of
14 partial redressability through declaratory judgment.

15 They were silent on the remedial
16 effect of a change in legal status of the parties if
17 declaratory judgment was ordered and how that would
18 impact the ongoing and worsening harm caused by the
19 Government's conduct.

20 They were silent, of course, as to any
21 new factual allegations in the Second Amended
22 Complaint as well as Plaintiffs' new request for
23 relief because that was not before them.

24 And of course they were silent on the
25 new Supreme Court precedent on *Uzuegbunum v.*

1 Preczewski, which also was decided after their
2 opinion.

3 So the Ninth Circuit does not lay any
4 of those issues to rest. The Ninth Circuit never
5 said this Court cannot declare a constitutional
6 violation where there is an active case or
7 controversy with ongoing injury and causation. And
8 it would have been wrong had they said that, but
9 they didn't get to that issue.

10 So in a constitutional case of this
11 magnitude and of first impression, these issues of
12 declaratory judgment, partial redressability, and
13 the scope of relief that's proper must be thoroughly
14 and carefully resolved at a trial on standing and
15 the merits.

16 For all of these reasons, Your Honor,
17 the Second Amended Complaint should be accepted as
18 overcoming the final jurisdictional threshold of
19 properly pleading redressability. And if this Court
20 disagrees, Plaintiff respectfully requests an
21 opportunity to further plead redressability by
22 amendment.

23 And unless Your Honor has further
24 questions, I will wait and respond to any other
25 issues on rebuttal.

1 THE COURT: I do have a question, and
2 I would like to jump to having you deal with it
3 head-on in your argument, and that is the late
4 filing by the Government on the analysis and the
5 implication of the Supreme Court case issued on June
6 17th, California v. Texas. And I -- you know, it's
7 a decision that was focused on the Affordable Care
8 Act, but may have implications in this case. And
9 I'm confident it will be argued strenuously by the
10 Government, but I would like to have your thoughts
11 on it at this point as I look at and listen to their
12 arguments.

13 MS. OLSON: Yes, Your Honor, I think
14 that the California v. Texas case is completely
15 irrelevant and off point to the issues before the
16 Court here. The reason is simple. In California v.
17 Texas, the Supreme Court found that there wasn't
18 injury and, because there wasn't going to be injury,
19 there couldn't be redressability.

20 So in that case the provision that
21 would have imposed fines on people who didn't have
22 insurance had already been decided by the Government
23 that it would not be enforced. So there was no
24 threat of the imposition of fines or harm in that
25 case, and that's why the Supreme Court said that

1 there is no redress that we can or should provide
2 here because there isn't injury in fact.

3 In contrast, of course, here the law
4 of the case is that Plaintiffs have adequately
5 established injury in fact and causation. And the
6 harms are ongoing. I mean, I think -- this has
7 really been a term of standing decisions. Just
8 today, Your Honor, another decision came down in the
9 TransUnion v. Ramirez case, which is also a standing
10 case. And there Justice Kavanaugh, writing for the
11 majority, says that for there to be a case or
12 controversy under Article III, the plaintiffs must
13 have a personal stake in the case and, to
14 demonstrate their personal stake, Plaintiffs must be
15 able to sufficiently answer the question, "What's
16 it to you?"

17 And that question -- "What's it to
18 you?" -- is very, very clear here. It's -- the
19 Government is acting as if these young people hold
20 no constitutional rights. They've said as much.
21 They also believe that their energy system policies
22 and practices are unreviewable and that it doesn't
23 matter if they continue burning fossil fuels
24 throughout the course of the century or not.

25 And that is a controversy between the

1 plaintiffs and their government that answers the
2 question, "What's it to you?"

3 And -- but I think the California v.
4 Texas case is not pertinent to this Court's
5 resolution of Plaintiffs' motion to amend, but the
6 TransUnion v. Ramirez case and possibly the Arthrex
7 case, which was also decided this week, may be
8 pertinent. And we intend to file a notice of
9 supplemental authority at least as to the TransUnion
10 case, Your Honor, which came out this morning.

11 THE COURT: Thank you. I try very
12 hard the mornings of expected opinions to be attuned
13 to them coming down, and I was getting ready for
14 this case and had an earlier hearing and did not
15 know that case came down. So I would have missed
16 just your eloquent summary of the argument and the
17 essence of the case, "What's it to you?" So I'm
18 very grateful I asked that question.

19 And you've got to have -- it's
20 interesting that all these cases have been basically
21 the body of the work of the Supreme Court in these
22 last few days.

23 Anything else you need to add? Thank
24 you. That was helpful to -- that late submission.

25 Anything else you need to add,

1 Ms. Olson, or are you finished and I can turn to the
2 Government? And I will come back to you for further
3 argument.

4 MS. OLSON: Yes, Your Honor. I'll
5 reserve time for after the Government argues. Thank
6 you.

7 THE COURT: You're welcome. For the
8 Government? Is it -- Mr. Duffy, are you going to
9 argue?

10 MR. DUFFY: Yes, that's right, Your
11 Honor.

12 THE COURT: Go right ahead.

13 MR. DUFFY: Good morning, and may it
14 please the Court, this is Sean Duffy with the United
15 States Department of Justice on behalf of the
16 defendants.

17 Your Honor, I'm going to go straight
18 to the bottom line issue before the Court today.
19 The Ninth Circuit has decided this case and ordered
20 that it be dismissed. The Ninth Circuit, en banc,
21 declined to reconsider that decision. There is no
22 standing. There is no jurisdiction. There is
23 nothing left for this Court to do but to dismiss the
24 case.

25 Plaintiffs disagree with the Ninth

1 Circuit decision. That is evident from their
2 briefs. The appropriate venue to raise that
3 disagreement, of course, is in the Supreme Court.

4 In the operative complaint, the
5 plaintiffs sought both declaratory and injunctive
6 relief. In the proposed amended complaint they seek
7 essentially the same relief.

8 Nothing has changed in this case. To
9 return to the trial court and litigate the same case
10 that the Ninth Circuit has ordered this Court to
11 dismiss as Plaintiffs propose is improper.

12 I'd like to begin with what we know
13 from the Ninth Circuit's decision because there are
14 at least a few inescapable takeaways worth noting.

15 First, we know declaratory relief
16 standing alone is not enough to satisfy the
17 redressability requirement for standing. And while
18 Plaintiffs have their reasons for disagreeing with
19 the Ninth Circuit's conclusion, that disagreement
20 isn't for this Court to resolve.

21 Second, we know an injunction also
22 won't suffice because the Ninth Circuit is skeptical
23 that even the incredibly broad injunction Plaintiffs
24 initially sought would not be substantially likely
25 to redress their injuries. It follows that the

1 vaguer injunction that they now seek falls even
2 shorter of satisfying redressability.

3 Plaintiffs' primary contention is that
4 they can amend the complaint to seek stand-alone
5 declaratory judgment on a constitutional issue.
6 They cannot do so.

7 Just last week in California v. Texas,
8 the Supreme Court reaffirmed the long-standing
9 principle that the Declaratory Judgment Act alone
10 does not provide a court with jurisdiction.
11 Instead, like every other type of remedy,
12 declaratory judgment actions must satisfy Article
13 III's case or controversy requirement.

14 The Plaintiffs referred to the
15 MedImmune decision. The Supreme Court in California
16 v. Texas relied on that decision as well for this
17 exact proposition. In California v. Texas the
18 plaintiffs sought a declaration that the minimal
19 coverage provision of the Affordable Care Act is
20 unconstitutional. But because the provision that
21 Plaintiffs challenged is not enforceable, they would
22 achieve no redress without a declaration -- or with
23 a declaration of it's constitutional.

24 The Supreme Court held that a
25 plaintiff did not have standing merely to obtain an

1 opinion that some government action is
2 unconstitutional. In other words, an Article III
3 court cannot declare constitutional rights in a
4 vacuum. There must be a redressable claim.

5 That holding applies here.

6 Plaintiffs' injuries will not be redressed merely if
7 the Court declares government action to be
8 unconstitutional. Here the Ninth Circuit found that
9 the claim for declaratory relief is not redressable
10 because a declaration on a constitutional ruling is
11 not likely to redress their injuries. The Ninth
12 Circuit concluded that the, quote, psychic
13 satisfaction of a declaration standing alone cannot
14 satisfy the redressability requirement.

15 And the Supreme Court decision in
16 California v. Texas affirms this principle.

17 THE COURT: So, Counsel, how do you --
18 you have to acknowledge that in the California case,
19 without a doubt -- and why every scholar who was
20 watching that case knew that the issue was that the
21 fine or fee had been eliminated and so it was really
22 rather a moot point to just simply make a
23 pronouncement about the Affordable Care Act. And
24 nobody could tie that together with the ability to
25 take those kids -- but this is very different

1 because the Ninth Circuit acknowledged that there
2 was harms to the plaintiffs in this instance and
3 that they had -- they had -- there was a link in
4 causation. And so it's postured very differently.

5 And then today -- and I haven't
6 obviously read the decision that just came down, but
7 I'm -- and I will, you know, immediately following
8 this hearing. But if Justice Kavanaugh is writing
9 that a case or controversy requires a personal stake
10 of "What's it to you," it seems me these 21 children
11 have certainly put that in the arena of controversy
12 and -- in their amendment, which would be their
13 first opportunity -- first amendment in this case to
14 put in -- an opportunity to address this declaratory
15 action and have the -- have, then, the opportunity
16 for the federal government to understand that courts
17 are going to protect a constitutional right, which I
18 think I wrote clearly about -- that is, the ability
19 to breathe, have clean water, have an energy source,
20 and be free from, let's say, for example in Oregon,
21 fires, wildfires, drought, inability to provide
22 resources for the community -- that they would have
23 a chance to have that right, declaratory judgment.

24 And then it would then empower the
25 government -- certainly a district court judge would

1 not be running the government -- but the government
2 to know that they have an obligation to address
3 policies that impinge on that constitutional right.

4 And that's, in essence, I think what
5 the Ninth Circuit case talked about in terms of
6 understanding the -- from their vantage point --
7 from their vantage point what was possible for a
8 court to do. Although I may disagree that the -- an
9 opportunity for a district court judge to oversee
10 and to help all three branches of government do a
11 better job of protecting the constitutional right to
12 breathe the air, have water, have resources
13 available, certainly that's contemplated in the way
14 in which our government was established. But that's
15 way down the road.

16 So I think -- you know, I'm happy to
17 hear further argument.

18 I also think that the Ninth Circuit
19 anticipated that if there could be a way to replead
20 this case, it was not foreclosed to this Court.

21 So anyway, I just think the new case
22 today -- I guess I'm thinking a little bit out loud.
23 The new case today -- "What's it to you?" -- these
24 young people have certainly thrown down that
25 question.

1 And it seems like the Supreme Court
2 decisions in these two most recent cases give me
3 guidance as to what I need to do. So go ahead.

4 MR. DUFFY: Your Honor, I confess I
5 haven't read the decision that came down today, but
6 if Your Honor wants to have supplemental briefing on
7 that, we'll certainly do that.

8 THE COURT: Oh, I would like
9 supplemental briefing. And I will get the
10 transcript of this argument and do further research.

11 But -- so go right ahead. But it's
12 clear to me that there's -- this changes -- these
13 cases from the Supreme Court changed the complexion
14 of the case in significant ways.

15 And again, I believe even the Ninth
16 Circuit has given me some guidance. We're just
17 looking at what's the most appropriate. The
18 Government has a lot of latitude on how we should
19 proceed in this case.

20 So go right ahead. Continue your
21 argument.

22 MR. DUFFY: Okay. Well, I will
23 respond to your first point about the Court's
24 decision in California v. Texas. The plaintiffs
25 distinguish that case on the basis that their -- the

1 first prong of standing wasn't met in that case.

2 But the Supreme Court never sliced up the argument
3 that way. It looked -- it really just looked at
4 standing generally and determined that a declaratory
5 judgment standing alone without meeting the standing
6 requirements is impermissible.

7 Turning to the Ninth Circuit's
8 decision in this case, on the plaintiffs' request
9 for injunctive relief, the Ninth Circuit found at
10 least two reasons why Plaintiffs lack standing.
11 First, it expressed doubt that an injunction would
12 be substantially likely to redress Plaintiffs'
13 injuries. Based on Plaintiffs' own expert
14 testimony, injunctive relief is not likely to stop
15 climate change or ameliorate their injuries.

16 Second, the Court identified the
17 severe separation of powers concerns that this
18 lawsuit poses. It found the Plaintiffs' claims are
19 not redressable because the injunctive relief they
20 seek is not within the power of an Article III court
21 to grant.

22 The Ninth Circuit concluded that any
23 effective plan would necessarily require a host of
24 complex policy decisions entrusted to the wisdom and
25 discretion of the executive and legislative branches

1 and held that those decisions must be made by
2 elected representatives.

3 The proposed second complaint fares no
4 better than the first one. In it Plaintiffs
5 fundamentally seek the same declaratory and
6 injunctive relief that they sought previously. With
7 regard to the declaratory relief, in both complaints
8 Plaintiffs seek a declaration that the energy system
9 violates their constitutional rights and the public
10 trust doctrine and a declaration that Section 201 of
11 the Energy Policy Act is unconstitutional.

12 The declaratory relief that Plaintiffs
13 seek is the same in both complaints.

14 With regard to the injunctive relief
15 in the proposed amended complaint, Plaintiffs seek
16 to enjoin Defendants from carrying out policies,
17 practices, and affirmative actions that harm them.

18 Both complaints seek essentially the
19 same injunctive relief, which is to have the Court
20 essentially commandeer the energy policy of the
21 United States. This is not a possible remedy, and
22 it raises severe separation of powers issues.

23 And it is noted that the Ninth Circuit
24 found that both of these forms of relief are not
25 redressable.

1 Three important consequences flow --

2 THE COURT: I would -- excuse me. I
3 would disagree with that. I think what it does is
4 it gives direction to the Government to say when you
5 have choices and you have rights at stake and you
6 have a choice to use a source of energy that is
7 damaging or even a source that will sustain all the
8 abilities that the public may have to clean air,
9 clean water, resources -- you know, all that were
10 listed -- that their obligation is to choose the
11 source that will not damage.

12 I mean, I don't think it directs
13 anything. What it does is it gives guidance to the
14 federal government about, again, stepping up and
15 protecting the constitutional rights that have been
16 discussed.

17 So what is interesting in this case is
18 -- and what I think many people have not understood
19 -- is a district court is a place where the facts
20 are developed and the facts are laid out. And
21 perhaps you noted in my earlier decision, I
22 bifurcated. I bifurcated for a reason. I
23 bifurcated because if the facts and the trial on
24 those facts were out there, I strongly suspect -- it
25 goes right along with Ms. Olson's argument -- I

1 strongly suspect that -- when she says that the
2 federal government is likely to follow a court's
3 declaratory action, I strongly suspect if the
4 Government had those facts aired in open court, that
5 before the Court could even act there may be both
6 executive and legislative action that begins to
7 redress and address the damage done to the rights
8 that have been expressed by the 21 young people and
9 others.

10 So I think it's framing this in a way
11 in which trial courts are -- our best use is to
12 develop those facts. And then that's why I had a
13 second bifurcation and a place to -- how are those
14 redressed.

15 So, you know, this case is more
16 sophisticated than I think the Ninth Circuit
17 understood or that the Ninth Circuit understood what
18 a district court is capable of doing.

19 It's hard for me in this instance to
20 say otherwise, but so much work is done in
21 settlement discussions. That's why I often refer
22 everyone to settlement. In a settlement conference,
23 there's so much work that can come to the table when
24 people are interested in problem-solving and putting
25 mechanisms in place that allow people to address

1 these issues, because sometimes courts aren't the
2 best place.

3 But courts can be in a position where
4 they are, shall we say, backstopping the rights and
5 protecting those rights while solutions are reached
6 between and among the various parties who are both
7 in the case and not in the case.

8 So I hear you and the argument, but
9 I'm wanting you to think a little broader in terms
10 of -- not in such absolute terms, but to understand
11 why I think getting facts on the table all along in
12 this situation have been the goal of the Court and
13 important that these facts be developed on both
14 sides. Go ahead.

15 MR. DUFFY: Okay. I take your point,
16 Your Honor. But with respect to settlement, the
17 parties can explore settlement outside of the shadow
18 of this case.

19 THE COURT: Mr. Duffy, I am well aware
20 of that. And I know that -- I know that is a
21 parallel track. In most of my cases, it is a
22 parallel track because in so many ways I believe
23 settlement allows people to come to a resolution of
24 a case that -- where maybe nobody is particularly
25 perfectly satisfied, but they understand that there

1 is a problem to be addressed and they approach it in
2 a different fashion.

3 So, yes, I'm aware of that. But I'm
4 also trying to get you to focus on how this case,
5 moving forward with an amendment -- given what the
6 Supreme Court has said in the two most recent cases
7 and the way this case is postured, amending the
8 complaint is, frankly, not such a -- shall we say, a
9 controversial request on the part of the plaintiffs.

10 MR. DUFFY: Well, I disagree with Your
11 Honor's interpretation of what the Ninth Circuit has
12 ordered in this case. If the Ninth Circuit had any
13 inkling that the plaintiffs could file an amended
14 complaint on remand, I think there would have been
15 some language in that opinion to that effect, and I
16 see no language in the opinion to that effect.

17 THE COURT: Well, we're going to agree
18 to disagree on that point, because, let me tell you,
19 having been on the bench a long time, when they want
20 to dismiss with prejudice, they do that. I get
21 those opinions. When they don't, they leave it
22 open. And this was left open. I'm just saying.

23 MR. DUFFY: Okay. Well, with regard
24 -- you raise a couple of points going to the merits.
25 And let's not forget, the Ninth Circuit and the

1 Supreme Court understood that the striking breadth
2 of Plaintiffs' claims presents substantial grounds
3 for difference of opinion while at the same time
4 citing the standards for interlocutory appeal under
5 Section 1292(b). That observation wasn't only made
6 on standing. The Supreme Court clearly referred to
7 all aspects of the case.

8 So to the extent Plaintiffs insist
9 that an amendment is necessary to vindicate a clear
10 constitutional right, I just want to be clear that
11 the Ninth Circuit and the Supreme Court have not
12 accepted that view.

13 Even if Plaintiffs are ultimately
14 allowed to amend their complaint here, they will
15 ultimately have to contend with the faults in all
16 other aspects of their case, including the merits.

17 So we believe that three important
18 consequences flow ineluctably from the foregoing
19 analysis.

20 First, the Court must follow the Ninth
21 Circuit's mandate and dismiss the case. Dismissal
22 must be with prejudice, and the Court must deny the
23 motion to amend the complaint.

24 Under the rule of mandate, as Your
25 Honor's aware, a lower court is unquestionably

1 obligated to execute the terms of the mandate. And
2 the post-mandate conduct of the district court must
3 also be consistent with the spirit of the mandate.
4 The Ninth Circuit mandate is clear in this case.
5 They've instructed the Court to dismiss the case for
6 lack of Article III jurisdiction. That opinion
7 leaves no room for continuing this lawsuit based on
8 the minor amendments to the amended complaint.

9 Dismissal should be with prejudice.
10 Dismissal with prejudice is appropriate where a
11 complaint cannot be saved by an amendment. That's
12 the case here. Plaintiffs lack standing not merely
13 because of a pleading deficiency that could be
14 cured. That is clear from the proposed amended
15 complaint itself which does not in any way cure the
16 incurable standing deficiency that the Ninth Circuit
17 identified.

18 At bottom, the proposed amended
19 complaint -- in it there's no change -- there's no
20 allegation changing -- change in the government
21 action that was challenged. There's no change in
22 the types of harm the plaintiffs allege, and there's
23 no change in the declaratory relief the plaintiffs
24 seek. Indeed, Plaintiffs concede that they are not
25 bringing any new claims.

1 So dismissal should be with prejudice
2 because any claim Plaintiffs intend to bring is no
3 different than the unsuccessful claims they already
4 brought.

5 And the motion to amend should be
6 denied as futile. Futility by itself is grounds for
7 denying an amendment. Here futility mandates denial
8 of the proposed amendment because the proposed
9 complaint seeks the same declaratory injunctive
10 remedies that the Ninth Circuit found failed to
11 establish redressability for purposes of standing.

12 In sum, both the rule of mandate and
13 the futility of amendment mandate the same result in
14 this case, dismissal with prejudice.

15 At root, Plaintiffs' request for
16 declaratory relief seeks a constitutional opinion
17 without a remedy. But Article III courts do not
18 decide theoretical inquiries; they decide cases.

19 And Plaintiffs' request for injunctive
20 relief seeks nothing more than a request that the
21 judiciary commandeer the executive branch and do so
22 at the expense of the legislative branch of
23 government. Our constitution crafted separated
24 powers that does not allow one branch of government
25 to commandeer another. Under our system of

1 government, the resolution of some critical issues
2 that are perceived as requiring judicial resolution
3 are not always amenable to a judicial resolution.
4 And that reality is no doubt frustrating to those
5 who hoped for the judicial process to accomplish
6 what the political process has not.

7 It was surely frustrating to the
8 states in Texas v. California who sought to end the
9 Affordable Care Act. But the constitutional
10 limitations on the powers of the courts and the
11 separations of powers principles within that
12 document preserved the process by which our
13 democracy functions.

14 We do not disrespect youth and the
15 important cause that they take up, but the place to
16 take up that cause is not the courtroom but instead
17 with their elected representative.

18 For all the foregoing reasons, the
19 Court should deny the motion to amend and it should
20 dismiss this case with prejudice as the Ninth
21 Circuit mandate requires.

22 If Your Honor has any further
23 questions, I'm happy to take those.

24 THE COURT: No, I'm fine. Thank you.

25 MR. DUFFY: Thank you, Your Honor.

1 THE COURT: Ms. Olson, do you have
2 something more to add?

3 MS. OLSON: Yes, thank you. I just
4 have, I think, two or three quick points, Your
5 Honor.

6 I think it's incredible that six years
7 into this case where Plaintiffs have adequately
8 demonstrated they have ongoing and really
9 life-threatening injuries and they have demonstrated
10 with sufficient evidence that the Government is the
11 substantial cause of those injuries -- and those
12 findings or rulings of this Court below have been
13 affirmed by the Ninth Circuit -- but we are still
14 here arguing, six years later, over whether
15 Plaintiffs can get a declaratory judgment on their
16 constitutional rights.

17 It's -- I know of no other case that
18 would say that declaratory relief is not appropriate
19 and not required in this situation.

20 And the reason why it's so important
21 -- I want to emphasize this -- and it really ties
22 into what Mr. Duffy said. Mr. Duffy says that the
23 energy system is up to the political branches and
24 that these young people need to go convince their
25 elected officials or they need to go to the polls

1 and vote to change that system. And there's no
2 other instance where a constitutional right, a
3 fundamental right, is being violated that plaintiffs
4 are told to go to the polls.

5 So, for example, people who want to
6 protect their Second Amendment gun rights, they are
7 not told, "Go to the polls." They are granted
8 standing to come to the federal courts to have an
9 adjudication of their rights.

10 And every decision the Government has
11 made about the energy system today and for the past
12 50 years has been, to this point, solely up to the
13 political will of the majority and has not been
14 cavened by the constitution. And those policies and
15 practices, which Defendants admit are endangering
16 these Plaintiffs, have never been evaluated for
17 their constitutionality. But fundamental to our
18 constitutional democracy and its survival is these
19 young people's inalienable constitutional rights
20 that cannot be put up to a vote or the politics of
21 lobbyists.

22 They are protected. The founders
23 protected people and their rights from having to
24 just go to the polls to secure them and protect
25 them.

1 And I think the Ninth Circuit case in
2 Ibrahim v. Department of Homeland Security at page
3 993 also brings this home. And it says a plaintiff
4 is not required to solve all roadblocks to full
5 realization of their rights at one time, that a
6 declaration of people's rights can remove one vital
7 roadblock to actually redressing harm that has been
8 caused.

9 So Plaintiffs clearly -- I just want
10 to state this clearly. We've said this for a long
11 time, but we do not ask the Court to commandeer the
12 nation's energy system. We want the Court here to
13 do its job -- to hear the evidence on both sides,
14 find the facts, declare the rights, and, if Your
15 Honor finds violations of those rights, to also
16 declare them.

17 And what Plaintiffs truly want is for
18 the political branches of government to stop
19 infringing their rights and to make policy decisions
20 that are protective of them.

21 And -- and then the last point, and
22 then I'll conclude, is that the defendants keep
23 saying that the nation's energy policy is dedicated
24 to their unfettered discretion. But they have never
25 once argued that the nation's energy system presents

1 a nonjusticiable political question for the nation's
2 energy policy. And they've never once said that the
3 climate crisis and the harms it's imposing on these
4 children are nonjusticiable because of the political
5 question doctrine. And that argument has done --
6 it's been decided. It's law of the case.

7 So as we head into over 110-degree
8 temperatures this early summer weekend in Eugene,
9 Oregon, and a summer again ravaged by drought, with
10 looming threats of another vicious wildfire season,
11 there's a new draft report by the United Nations
12 that just came out, and it says, quote, The worst is
13 yet to come affecting our children's and our
14 grandchildren's lives much more than our own.

15 Six years into this case these
16 plaintiffs are still being individually harmed by
17 their government's policies and practices, and only
18 a declaration by this Court of their constitutional
19 rights and the Government's violation thereof, after
20 all of the facts are laid bare, will truly begin to
21 protect their rights and redress their ongoing
22 injuries.

23 And with that, Your Honor, unless you
24 have further questions, I just have a couple of
25 housekeeping matters.

1 THE COURT: Go ahead. I don't have
2 any other questions. Thank you.

3 MS. OLSON: Okay. So we will file the
4 notice of supplemental authority and respond on the
5 California v. Texas case and perhaps the Arthrex
6 case, which we need to read more carefully.

7 And we also are going to submit a new
8 Second Amended Complaint that corrects for all of
9 the individual defendants who have now been
10 appointed and confirmed to those defendant positions
11 as well as remove the organizational plaintiff,
12 Earth Guardians, as a named plaintiff in the Second
13 Amended Complaint since this case is moving forward
14 for the individual violations.

15 And we will also look at adding the
16 nominal damages request for relief.

17 THE COURT: Would you in your
18 supplement briefing obviously touch on the case that
19 came down today? I have fortunately had a law clerk
20 who has read it quickly and summarized it for me,
21 but I would essentially like you to talk about that
22 case as well in your supplement.

23 MS. OLSON: Absolutely, Your Honor.
24 We will do that.

25 THE COURT: All right. Thank you.

1 MS. OLSON: Thank you very much.

2 THE COURT: Anything else for you,
3 Mr. Duffy?

4 MR. DUFFY: No. I just have one
5 comment, and that will be it.

6 It's not Mr. Duffy who said that the
7 energy system is up to the political branches. It's
8 the Ninth Circuit who said that definitively in its
9 opinion.

10 And insofar as Plaintiffs are saying
11 that a declaratory judgment would be enough to grant
12 some redressability here, there again, the Ninth
13 Circuit has spoken to that definitively. It said
14 no, and this Court is bound by that.

15 THE COURT: So, Mr. Duffy, I would
16 also tell you that the Government has the chance to
17 take a look -- and I will obviously pull the UN
18 report, the worst is yet to come, and I will read
19 that carefully -- that report carefully as well.
20 And I would think at this point the Government might
21 take a look at what -- what courts can do to be
22 helpful in this instance.

23 And I was hopeful that your argument
24 might have been different today. But I'm prepared
25 to go forward and make my decision in this case.

1 But I'm going to tell you honestly --
2 and I'm just putting this -- noting this for the
3 record. I'm not going to be able to get at this
4 immediately, and I'll tell you why. I have
5 emergency hearings on water cases in part of this
6 state. I have an emergency ESA case. I have TROs
7 that are in front of me. And you will have your
8 opinion as I get to it.

9 But the nature of the work is such
10 that as a district court judge in Oregon, I'm keenly
11 aware of some of the issues that were argued here
12 today. So I will get you an opinion when we -- I've
13 also asked for a transcript. I will look for the
14 supplemental briefing. But do not look for an
15 immediate ruling. I'm taking this under advisement.

16 I thank you for your time this
17 morning, and we're in recess. Thank you.

18 MS. OLSON: Thank you, Your Honor.

19 MR. DUFFY: Thank you, Your Honor.

20 (Conclusion of proceedings.)
21
22
23
24
25

1 State of Oregon)
2 County of Lane) ss.

3
4 I, Eleanor G. Knapp, CSR-RPR, a Certified
5 Shorthand Reporter for the State of Oregon, certify
6 that the witness was sworn and the transcript is a
7 true record of the testimony given by the witness;
8 that at said time and place I reported all testimony
9 and other oral proceedings had in the foregoing
10 matter; that the foregoing transcript consisting of
11 53 pages contains a full, true and correct
12 transcript of said proceedings reported by me to the
13 best of my ability on said date.

14 If any of the parties or the witness requested
15 review of the transcript at the time of the
16 proceedings, such correction pages are attached.

17 IN WITNESS WHEREOF, I have set my hand this 28th
18 day of June 2021, in the City of Eugene, County of
19 Lane, State of Oregon.

20
21 

22 Eleanor G. Knapp, CSR-RPR

23 CSR No. 93-0262

24 Expires: September 30, 2023
25

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